Petition

81-1877

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DAVID BRUMMITT
AND
JACK WAYNE SCARBOROUGH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT PETITION FOR CERTIORARI

RICHARD ESPER
1100 Montana, Suite 201
El Paso, Texas 79902
(915) 533-3494
Attorney of Record
for Petitioners

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

I. WHETHER THE PROFFER OF PROOF PRESENTED BY PETITIONER BRUMMITT BELOW EVIDENCED A REASONABLE FEAR OF FOREIGN PROSECUTION SO AS TO ENTITLE HIM TO RAISE A FIFTH AMENDMENT DEFENSE TO HIS CONTEMPT CHARGES.

II. WHETHER THE PROFFER OF PROOF PRESENTED BY PETITIONER SCARBOROUGH BELOW EVIDENCED A REASONABLE FEAR OF FOREIGN PROSECUTION SO AS TO ENTITLE HIM TO RAISE A FIFTH AMENDMENT DEFENSE TO HIS CONTEMPT CHARGES.

III. WHETHER THE PETITIONER BRUMMITT WAS ENTITLED TO PRESENT HIS CLAIM OF FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION TO THE JURY IN HIS CRIMINAL CASE.

IV. THE PETITIONER SCARBOROUGH'S CONVICTION FOR CRIMINAL CONTEMPT FOR REFUSING TO TESTIFY BEFORE A GRAND JURY WAS VOID OR VOIDABLE BECAUSE THE APPELLANT'S REFUSAL TO TESTIFY WAS A LEGITIMATE EXERCISE OF HIS FIFTH AMENDMENT RIGHTS TO REMAIN SILENT.

V. WHETHER THE INDICTMENT AGAINST PETITIONER BRUMMIT SHOULD HAVE BEEN DISMISSED BECAUSE IT WAS RETURNED BY THE VERY GRAND JURY THAT WITNESSED HIS ALLEGED CONTEMPT AND WHOSE INVESTIGATION WAS IMPEDED BY HIS ALLEGED CONTEMPT.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINIONS BELOW 1

JURISDICTION 2

APPLICABLE PORTIONS OF THE UNITED STATES CONSTITUTION, STATUTES, AND RULES 3

STATEMENT OF THE CASE 4

A. The Case Below 4

B. The Decisions of the Panel of the Fifth Circuit 10

REASONS WHY THE WRIT SHOULD BE GRANTED 13

I. Whether The Proffer Of Proof Presented By Petitioner Brummitt Below Evidenced A Reasonable Fear Of Foreign Prosecution So As To Entitle Him To Raise A Fifth Amendment Defense To His Contempt Charges 13

II. Whether The Proffer Of Proof Presented By Petitioner Scarborough Below Evidenced A Reasonable Fear Of Foreign Prosecution So As To Entitle Him To Raise A Fifth Amendment Defense To His Contempt Charges 13

A. The General Issue 13

B. The Reasonableness of the Appellant's Fears 14

1. Contrasting Facts Offered in Similar Cases 14

2. The Protection Offered by F.R.Cr.P. Rule 6(e) 17

III. Whether The Petitioner Brummitt Was Entitled To Present His Claim Of Fifth Amendment

Page

Privilege Against Self-Incrimination To The Jury In His Criminal Case 19

IV. The Petitioner Scarborough's Conviction For Criminal Contempt For Refusing To Testify Before A Grand Jury Was Void Or Voidable Because The Appellant's Refusal To Testify Was A Legitimate Exercise Of His Fifth Amendment Rights To Remain Silent 20

A. The Law 20

1. A Fear of Foreign Prosecution 20

2. The Appellant's Guilty Plea 22

V. Whether The Indictment Against Petitioner Brummit Should Have Been Dismissed Because It Was Returned By The Very Grand Jury That Witnessed His Alleged Contempt And Whose Investigation Was Impeded By His Alleged Contempt 23

CONCLUSION AND PRAYER 24

APPENDICES:

A. Published Opinion of the United States Court of Appeals for the Fifth Circuit affirming Appellant's conviction in *United States v. Brummitt*, No. 81-1067 (December 28, 1981) 1a

B. Unpublished Summary Calendar Judgment of the United States Court of Appeals for the Fifth Circuit affirming Appellant's conviction in *United States v. Scarborough*, No. 81-1066 (November 23, 1981) 20a

C. Order of the United States Court of Appeals for the Fifth Circuit denying Rehearing in *United States v. Brummitt*, No. 81-1067 (February 8, 1982) 21a

D. Order of the United States Court of Appeals for the Fifth Circuit denying Rehearing in *United States v. Scarborough*, No. 81-1066 (February 8, 1982) 23a

TABLE OF AUTHORITIES

Page

CASES:

Gardner v. Broderick, 392 U.S. 273 (1968) 17

Harrington v. United States, 444 F.2d 1190 (5th Cir. 1971) 23

In Re: Brummitt, 608 F.2d 640 (5th Cir. 1979) 5

In Re: Brummitt, 613 F.2d 62 (5th Cir. 1980) 5, 9

In Re: Cardassi, 351 F. Supp. 1080 (D. Conn. 1978) . . . 13, 15, 16

In Re: Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979) 17

In Re: Grand Jury Proceeding (Field), 532 F.2d 404, 406 S. Ct. 354, 50 L. Ed. 2d 309 (1976) 10, 13

In Re: Grand Jury Proceedings (Postal), 559 F.2d 234 (5th Cir. 1977), *cert. denied*, 434 U.S. 1062, 98 S. Ct. 1234, 55 L. Ed. 2d 762 (1978) 10

In Re: Grand Jury Subpoena of Flannigan, 30 Criminal Law Reporter 1094 (March 23, 1982) 14

In Re: Tierney, 465 F.2d 806 (5th Cir. 1972), *cert. denied*, 410 U.S. 914, 93 S. Ct. 959, 35 L. Ed. 2d 276 (1973) 10-11

Kastigar v. United States, 406 U.S. 441 (1972) 17

Leary v. United States, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969) 22

Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964) 17, 19, 21

Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963) 24

United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977) 18

United States v. Brazzano, 570 F.2d 1120 (3d Cir. 1977) 18

United States v. Brummitt, 665 F.2d 521 (5th Cir. 1981) 1, 2

United States v. Bukowski, 435 F.2d 1094 (7th Cir. 1970), *cert. denied*, 401 U.S. 911, 91 S. Ct. 874, 37 L. Ed. 2d 809 (1971) 11, 19

CASES, continued: Page

United States v. Elorduy, 612 F.2d 986 (5th Cir. 1980) 19

United States v. Kowalchuk, Unpublished Opinion No. 77-118 (D. Pa. Oct. 20, 1978) 14

United States v. Liquori, 430 F.2d 842 (1970) 23

Cf. United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), reh. 5 Cir., 590 F.2d 1379 (on other grounds), *cert. denied*, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979) 11

United States of America v. McCrae, LR 3 Ch App. 79 (1867) 21

United States v. Phillips Petroleum, 435 F. Supp. 610 (D. Okla. 1977) 18

United States v. Reyes, 645 F.2d 285 (5th Cir. 1981) 19

United States v. Scarborough, No. 81-1066 (5th Cir. February 8, 1982) 2, 12

United States v. Scarborough, 664 F.2d 286 (5th Cir. 1981) 2

United States v. Sheldon, 544 F.2d 213 (5th Cir. 1976) 20

United States v. Trucis, 89 F.R.D. 671 (D. Penn. 1981) 13

United States v. United States Coin & Currency, 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041 22

United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977) . . . 13, 15

Wood v. Georgia, 370 U.S. 375, 8 L. Ed. 2d 569, 82 S. Ct. 1364 (1962) 23

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972) 13, 20, 21

OTHER AUTHORITIES:

Federal Rules of Criminal Procedure, Rule 6e 3, 7

Supreme Court Rules, Rule 22 2

United States Constitution, Amend. V 3

28 U.S.C. § 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DAVID BRUMMITT
AND
JACK WAYNE SCARBOROUGH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT PETITION FOR CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit from which David Brummitt now petitions for certiorari is reported as *United States v. Brummitt,* 665 F.2d 521 (5th Cir. 1981), and is reproduced herein as Appendix "A". The Opinion of the

United States Court of Appeals for the Fifth Circuit from which Jack Wayne Scarborough now petitions for certiorari is reported as *United States v. Scarborough,* 664 F.2d 286 (5th Cir. 1981) (Table), and is reproduced herein as Appendix "B". The Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Brummitt,* No. 81-1067 (5th Cir. February 8, 1982), denying rehearing is not yet published, but is reproduced herein as Appendix "C". The Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Scarborough,* No. 81-1066 (5th Cir. February 8, 1982), denying rehearing is not yet published, but is reproduced herein as Appendix "D".

JURISDICTION

The judgment of the Fifth Circuit affirming the conviction of Petitioner Brummitt was entered on December 28, 1981. A timely Petition for Rehearing was filed by Petitioner Brummitt and was denied by the United States Court of Appeals for the Fifth Circuit on February 8, 1982. This petition is timely filed within sixty (60) days of the denial of rehearing under Rule 22, *Supreme Court Rules.* This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment of the Fifth Circuit affirming the conviction of Petitioner Scarborough was entered on November 12, 1981. A timely Petition for Rehearing was filed by Petitioner Scarborough and was denied by the United States Court of Appeals for the Fifth Circuit on February 8, 1982. This petition is timely filed within sixty (60) days of the denial of rehearing under Rule 22, *Supreme Court Rules.* This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PORTIONS OF THE UNITED STATES CONSTITUTION, STATUTES AND RULES

1. In pertinent part, the Fifth Amendment to the United States Constitution provides that:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

2. In pertinent part, the Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

3. In pertinent part, 18 U.S.C. 401(3) reads:

> Section 401. POWER OF COURT
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

4. In pertinent part, F. R. Cr. P., Rule 6e reads:

> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury; may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

* * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF CASE

Since this is a joint Petition for a Writ of Certiorari, the record pertaining to the Petitioner Brummitt will be designated as B.RI, et seq.; B.Sup.R.I, et seq.; et cetera. The record pertaining to the Petitioner Scarborough will be designated as S.RI, et seq.; S.Sup.R.I, et seq.; et cetera.

A. The Case Below

The case revolves around a 1976 plane crash in Marfa, Texas, just a few miles north of the Mexican Border. Three years later in the summer of 1979, Petitioner Brummitt and Petitioner Scarborough were subpoenaed to appear before a Federal Grand Jury in El Paso, Texas. Upon their appearance, the Petitioners cited the Fifth Amendment and refused to testify regarding the 1976 plane crash (B.RI 1; S.RI 1). The Petitioners were then granted immunity by the Court pursuant to 18

U.S.C. 6002; however, the Petitioners still persisted in claiming their right against self incrimination in regard to a "foreign prosecution" in Mexico, and thereafter the District Court imposed civil confinement (B. RIII 1, et seq.; S. Sup. RII 1, et seq.). Subsequently, this confinement was initially reversed in *In Re Brummitt,* 608 F.2d 640 (5th Cir. 1979), but was affirmed after remand in *In Re Brummitt,* 613 F.2d 62 (5th in 1980). During and following this appeal, the Petitioners served some four months in "civil" confinement (B.RV 8; S. RIV 17).

During the last day the Federal Grand Jury was in session, the Petitioners were removed from prison and presented again to the same grand jury where the Petitioners again claimed their fear of foreign prosecution. Subsequently, the Petitioners were refused (about the plane crash) on the day of their indictment (B.R. I 1-2, S.R. I 1-2). Prior to the day of that second appearance before the grand jury, the Petitioners filed a Motion in the District Court to quash their subpoenaes on the Fifth Amendment ground of fear of foreign prosecution (S. Sup. R. I 79).

Prior to trial, the Petitioner Brummitt filed *Motion to Dismiss* that indictment based on the fact that the Petitioner had been indicted by the same grand jury which witnessed his alleged contempt and whose investigation was impeded by his alleged contempt (RI 60, et seq.). The Petitioner Brummitt also challenged the very basis of the prosecution and moved the District Court to be allowed to present a Fifth Amendment defense of fear of foreign prosecution before the court and/or before the jury (BRIV 4-5), (BRI 111). Such *Motion* was denied by the court (BRI 111), and the Petitioner was limited to a *Proffer of Proof, supra.* The *Proffer* stated the following facts:

A. That the objective facts underlying the investigation carried on by Federal Grand Jury No. 79-1 in El Paso, Texas on September 18, 1979, and on August 8, 1980, concerned an alleged crash of an airplane laden with marijuana a few miles north of the Mexico-United States Border near Presidio, Texas, in March of 1976. Allegedly, DAVID MICHAEL BRUMMITT, Defendant herein, was an occupant in this plane as it flew from Mexico towards some unknown location in the United States. The Defendant would show this Court that these facts clearly and objectively imply violations of Mexican Criminal Law.

B. That the actual questions and specific area of inquiry of Federal Grand Jury No. 79-1 concerned criminal activities centering in Mexico, for example:

> Q. All right let's take off where we left off. We are talking about one occurrence where your plane crashed in Marfa and you were arrested. And that is all behind you. And you paid a fine, as I recall. Now I want to ask you some more details on that. I want to ask you did you pay for all of the marijuana in MEXICO yourself, all of your money or was any of it your money? What money did you use to buy the marijuana in MEXICO?

(Emphasis supplied; questions asked on September 18, 1979.)

and further example:

> Q. Had you been in MEXICO? * * *
>
> Q. Had you been into MEXICO? * * *
>
> Q. Well, what did Mr. Scarborough, the pilot tell you where you were when you—you took off from somewhere, you didn't fly around up there endlessly, where were you when you took off before the crash? Were you in CHIHUAHUA CITY?

Are you going to tell us or do you refuse to answer?

(Emphasis supplied; questions asked on August 8, 1980.)

C. That the Defendant, DAVID MICHAEL BRUMMITT, has an actual subjective fear of foreign prosecution and would reveal in an in camera questioning by this Court concerning his Fifth Amendment claim regarding prosecution in Mexico various details which would show that his fear is reasonable.

D. That the Defendant's fear of prosecution in Mexico is reasonable, because:

1. That his Grand Jury testimony would become available to prosecutors and drug enforcement officers in the Republic of Mexico, specifically:

That if Jerry Tanzy, Assistant United States Attorney for the Western District of Texas, El Paso Division were subpoenaed to testify in this cause that he would testify that there is a "JANUS" program currently in existence between the United States of America and the Republic of Mexico. Mr. Tanzy would further testify that this program involves exchanges of evidence including Federal Grand Jury testimony between the United States and the Republic of Mexico, pursuant to F.R.Cr.P. 6(6e).

2. That this Defendant's Grand Jury testimony would most probably result in his prosecution when delivered to Mexican Authorities, specifically:

That if Mr. Hernan Rivera was subpoenaed, he would testify that he is licensed lawyer in the state of Chihuahua, Republic of Mexico. Mr. Rivera would further testify that he was educated at Universidad, Mexico City, and that

he has practiced law for some nine (9) years. At this point, the Defendant would have offered Mr. Hernan Rivera as an expert witness in Mexican Law.

Mr. Rivera would go on to testify that he is familiar with criminal prosecutions in Mexico. He would state that the Republic of Mexico is eager to prosecute American citizens who violate Mexican Drug Law and does so because it is felt that the Mexican Drug Business is encouraged and financed by buyers from the United States. He would further state that possession of marijuana offense under Mexican law, specifically CODIGO PENAL MEXICANO, ARTS. 195, 197 (1967 Amend.) Mr. Rivera would also testify that a sworn statement before a United States Grand Jury which dealt with narcotic offenses in Mexico could and most probably would serve the basis for criminal prosecution in Mexico. He would also testify that such a document could be introduced at trial within the discretion of the Mexican Court.

That prior to this Defendant's appearances before the Grand Jury, the United States did not offer immunity against Mexican prosecution; did not pledge to take steps to prevent such prosecution and did not pledge to prevent transfer of this Defendant's testimony.

4. That prior to this Defendant's appearances before Grand Jury, the United States District Court did not guarantee that the Defendant's testimony would be transferred pursuant to Rule 6(e), but only guarantee a hearing before transfer which is required by law in any regard.

5. That the Defendant's testimony on the information contained in this testimony could be released informally without a Rule 6(e) hearing to Federal Drug Enforcement Agencies

who would in turn share this information with Mexican Drug Enforcement Agencies, pursuant to the exceptions stated in Rule 6(e).

E. That the particular United States Attorneys conducting the Federal Grand Jury on September 18, 1979, and on August 8, 1980, have leaked confidential Grand Jury testimony and other evidence in violation of F.R.Cr.P., Rule 6(e) to the news media in El Paso, Texas, within the time frame set forth in the above.

F. That the United States intends a criminal prosecution of whoever is implicated in the testimony of this Defendant as to the 1976 incident recounted herein, and that the United States intends to call this Defendant as prosecution witness in such prosecution, thereby making his Grand Jury testimony available to hostile Defendants under 18 U.S.C. § 3500.

Petitioner Scarborough contented himself with an earlier submitted *Joint Proffer of Proof*, Resp. Ex. "D", S. Sup. R.I. at 37, which stated the same essential facts.

The Petitioner Scarborough later supplemented this offer with the following information:

These subpoenas should be quashed by this Court on the grounds that further information has been gathered by defense counsel to the effect that United States has falsely represented to this Court that F.R.Cr.P. 6(e) would prevent the respondent's grand jury testimony from being transmitted to the Republic of Mexico. This representation by the United States Attorney was accepted by the United States Court of Appeals for the Fifth Circuit in *United States v. Brummitt*, 613 F.2d 62 (5th Cir. 1980). It now appears that there is a secret executive protocol with Mexico entitled "JANUS" which involves the transfer of reports, grand jury

testimony, et cetera, involving narcotics activities in Mexico directly to Mexican Law Enforcement agencies. The Respondent's testimony falls into this category. (Sup. RI 79).

Subsequently, the Petitioner Scarborough pled guilty to one count of the Indictment and the other count was dismissed as a result of a plea bargain (S.RI 132). Petitioner Scarborough was sentenced on January 29, 1981 to five (5) years imprisonment (SRI 132).

B. The Decisions of the Panel of the Fifth Circuit

In *United States v. Brummitt,* No. 81-1067, Slip Opinion (December 28, 1981), this Panel affirmed the Petitioner's conviction. The Petitioner on appeal had argued that he had presented a prima facie case of fear of foreign prosecution to justify his silence before the Grand Jury. On this issue, the Court of Appeals ruled:

> While the Fifth Circuit has recognized that a different case might be presented where the appellant demonstrated that the content of his answers would be used as evidence against him in a foreign prosecution, *In Re: Grand Jury Proceedings (Field),* 532 F.2d 404, 406 S.Ct. 354, 50 L.Ed.2d 309 (1976), the defendant Brummitt has not made a showing on the record that he is in any real danger that his compelled testimony might be used in or give rise to a foreign prosecution. *In Re: Grand Jury Proceedings (Postal),* 559 F.2d 234, 236-37 (5th Cir. 1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1234, 55 L. Ed. 2d 762 (1978). Furthermore, under present circuit jurisprudence, "because of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), Fed. R. Crim. P., provides for this secrecy". *In Re:*

Tierney, supra, 465 F.2d at 811. *Cf., United States v. Malatesta,* 583 F.2d 748, 752-53 (5th Cir. 1978), reh., 5 Cir. 590 F.2d 1379 (on other grounds), *cert. denied,* 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). *Brummitt* at 576-577.

Petitioner Brummitt also argued on appeal that he should have been allowed to present the same issue to the jury in his criminal trial. The Court of Appeals dealt with this point by holding:

> Without citation of relevant authority, Brummitt also contends that he should have been permitted to make a factual showing of the reality of the threat to him of foreign prosecution that might result from his compelled testimony. As we understand the record, the district court afforded him an opportunity to do so before the court itself in a nonjury hearing, but Brummitt was content to rely upon his proffer—and, in the light of controlling circuit precedent, we find that this proffer was not sufficient to show more than a speculative and merely abstract fear of foreign prosecution. Brummitt contends that he should have been permitted to present before the jury the reality of his fear of foreign prosecution, as a defense to the charged criminal contempt. However, the contempt was based on his failure to comply with a court order directing him to answer the questions, and the lawfulness of the court's order "involves a pure question of law whose determination is cognizable by the court and not the jury". *United States v. Bukowski,* 435 F.2d 1094, 1108 (7th Cir. 1970), *cert. denied,* 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971). *Brummitt,* at 577.

Another issue argued by the Petitioner Brummitt was that he was entitled to have his Motion to Dismiss the Indictment granted by the trial court because his criminal

contempt Indictment was returned by the same Grand Jury which witnessed his alleged contempt and whose investigation was allegedly impeded by the alleged contempt. The Fifth Circuit did not rule on this issue either specifically or by reference. *Brummitt*, Slip Opinion at 572-582.

The Fifth Circuit's *Opinion* in *United States v. Scarborough*, No. 81-1066 (5th Cir. November 23, 1981), is an unpublished per curiam opinion reading simply: "affirmed" without legal reasoning or authorities. It does not state the grounds upon which the Petitioner Scarborough's fear of prosecution was rejected by the panel, whether: (1) factual; (2) the unavailability of the defense under F. R. Cr. P. Rule 6(e); (3) waiver of the defense by the Petitioner Scarborough's guilty plea; or whatever (see Appendix "B").

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

WHETHER THE PROFFER OF PROOF PRESENTED BY PETITIONER BRUMMITT BELOW EVIDENCED A REASONABLE FEAR OF FOREIGN PROSECUTION SO AS TO ENTITLE HIM TO RAISE A FIFTH AMENDMENT DEFENSE TO HIS CONTEMPT CHARGES.

II.

WHETHER THE PROFFER OF PROOF PRESENTED BY PETITIONER SCARBOROUGH BELOW EVIDENCED A REASONABLE FEAR OF FOREIGN PROSECUTION SO AS TO ENTITLE HIM TO RAISE A FIFTH AMENDMENT DEFENSE TO HIS CONTEMPT CHARGES.

A. The General Issue

The Petitioners argue that the *Proffers of Proof, supra,* present a prima facie case of a constitutionally cognizable fear of foreign prosecution so as to entitle him to raise it as a Fifth Amendment defense to criminal contempt charges lodged against them. *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972). Since *Zicarelli,* various courts including this one have indicated that proper facts would invoke the Fifth Amendment's protection against self-incrimination in a context of foreign prosecution, *In Re: Grand Jury Proceedings (Field),* 532 F.2d 404 (5th Cir.), *cert. denied,* 429 U.S. 940, 97 S. Ct. 354, 50 L. Ed. 2d 309 (1976); *United States v. Yanagita,* 552 F.2d 940 (2d Cir. 1977); *In Re: Cardassi,* 351 F. Supp. 1080 (D. Conn. 1978); *United States v. Trucis,* 89 F.R.D. 671 (D. Penn. 1981). However, in spite of the *Proffer* (see *Statement of the Case, supra*),

this Court found that Petitioners' fears were unreasonable and unsubstantiated, *Brummitt,* at 574-577.

B. The Reasonableness of the Appellant's Fears

1. *Contrasting Facts Offered in Similar Cases*

In asking this Court to consider the finding of the Fifth Circuit that the Petitioners' fears were unreasonable and unsubstantiated, the Petitioners would refer this Court to *Cardassi* and *Trucis* where much less specific facts were found to invoke the Fifth Amendment. In *Cardassi* for instance, the trial court heard evidence that was identical in nature to that presented in this Appellant's *Proffer* except that the *Cardassi* was much less detailed; and, of course, *Cardassi* dealt with a *potential* Mexican prosecution as in our case. *Cardassi,* 351 F. Supp. at 1080 et seq.[1] In *Trucis,* the possibility of a *potential* prosecution in Latvia for World War II offenses against Latvian Jews was held sufficient, circumstances which were nowhere as immediate in time or location as in our case. *Trucis,* 89 F.R.D. at 672. Indeed, the *Trucis* court even noted that: ". . . None of the foreign sovereigns named in Trucis' memoranda—the Soviet Union, Israel, and West Germany—has expressed any interest in Trucis' prosecution". *Trucis,* at 673.

On the other hand, the Second Circuit's Opinion in *United States v. Yanagita, supra,* gives a clear indication of what facts would be insufficient to support a foreign prosecution claim:

---

[1] See also *United States v. Kowalchuk,* Unpublished Opinion, No. 77-118 (D. Pa. Oct. 20, 1978); *In Re: Grand Jury Subpoena of Flannigan,* 30 Criminal Law Reporter 1094 (March 23, 1982).

> While we might be willing to assume the interest of a foreign sovereign in prosecuting crimes by our citizens which occur on its soil, see e.g., *In Re Cardassi,* 351 F. Supp. 1080, 1084 (D. Conn. 1972), or where the offense falls within a frequently-used and clearly defined prohibition enacted by the foreign sovereign, we cannot make that assumption where, as here, the interpretation and application of the foreign statute is solely a matter of conjecture. *Yanagita,* at 947.

In *Yanagita,* "all of the activities of [the witnesses and their confederates] took place on American soil", 552 F.2d at 946. Indeed, the witnesses and their co-conspirators "had conspired to assassinate the Emperor of Japan on his United States visit", 552 F.2d at 946. In our case, the *Yanagita* Court would assume a foreign interest in prosecution on both grounds outlined above. Also, in regard to the questions asked, the *Yanagita* court held:

> In the present case, all of the activities of Chin, Young and the appellees took place on American soil. Nevertheless, because the theory of the government's case was that Chin and Young had conspired to assassinate the Emperor of Japan on his United States visit, Yanagita and Kondo claim that they risk Japanese prosecution. They rely principally on vaguely worded Japanese Penal Code provisions which define "an insurrectionary or seditious act with the object of overthrowing the government . . . or otherwise subverting the national constitution" as a capital offense, and provide a seven-year term of imprisonment for "A person who aids and assists the commission" of those crimes or attempts to commit those crimes "by furnishing arms." The Code applies to every person who commits the offenses "outside the territory of

Japan." Appellees, however, can point to no case in which this act has been interpreted as applying to attempts against the life of the Emperor, who is primarily a ceremonial figure under Japanese law. Nor do they cite any case in which a foreign citizen has been extradited to Japan under these provisions.

Even assuming the applicability of these statutes, appellees' case falls apart in two critical respects. First, there is no indication on the record that any question which was directed to Yanagita or Kondo required that they admit any knowledge of or participation in a conspiracy to overthrow Japan or to kill its Emperor. Nor is there any indication that they would be asked to furnish leads to such evidence. In fact, the government represented to the district court that its questions would be directed solely at the means by which the weapons in question had been transferred to Chin and Young, and the indictment against Chin and Young was itself solely restricted to firearms violations.

Yanagita, at 946-947.

This obviously is not our case, see *Proffer of Proof, supra.*

In contrast, the Petitioners have demonstrated:

(1) That his plane, laden with marijuana, crashed only a few miles north of Mexican Border near Presidio, Texas (RIII 37-44, Sup. RIII 40);

(2) That the Republic of Mexico specifically proscribes such activities in its Criminal Law (*Proffer*, Appendix "A", *infra*; Codigo Penal Mexicano, Arts. 195, 197 (1967 Amend.) *In Re: Cardassi, supra*, at 1084), and is generally interested in prosecuting such cases (*Proffer, infra*);

(3) That the questions asked specifically involved the Appellant's activities in Mexico (RIII 44; RIV 109).

The Petitioners admit that their prosecution in Mexico is hypothetical, and indeed the Petitioners hope that it will ever remain so. However, their fear is hypothetical only in the sense that it involves a prosecution which has yet to commence. All future prosecutions are hypothetical in that sense. If the Fifth Amendment to the United States Constitution only protected witnesses from incriminating themselves as to prosecutions which had already commenced, then it would offer poor protection, indeed. Suffice it to say that no court has ever limited the privilege against self-incrimination to existing prosecutions, or even actually contemplated prosecutions (see generally, *Murphy v. Waterfront Commission of New York*, 378 U.S. 53 (1964), *Gardner v. Broderick*, 392 U.S. 273 (1968), *Kastigar v. United States*, 406 U.S. 441 (1972)).

How can these decisions above be reconciled with the decision on this fact of this case?

2. *The Protection Offered by F.R.Cr.P. Rule 6(e)*

The Fifth Circuit has noted the imminently logical and legal refutation of the efficacy of Rule 6(e)'s protection found in Judge Hufstedler's concurring opinion in *In Re: Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166 (9th Cir. 1979) (see also, *Cardassi, supra*), *Brummitt*, at 577; and the Fifth Circuit also noted that intentional violations of Rule 6(e) by the United States had occurred before in this Circuit, *Malatesta*, 583 F.2d 748 (5th Cir. 1978), reh. 5 Cir., 590 F.2d 1379 (on other grounds), *cert. denied*, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979). What the Fifth Circuit did not do was to reconcile the pronouncements of Rule 6(e) with the

real world situation of actual violations of 6(e)[2] with the all but absolute requirements of guarantee against self-incrimination contained in the Fifth Amendment. In *Malatesta,* the Fifth Circuit leaned toward contempt proceedings against the prosecutor as an adequate enforcement of Rule 6(e) following a violation, *Malatesta,* 583 F.2d at 753-754.

If such a violation occurred in our case, how could any court impede, enjoin, or even affect a Mexican prosecution through the use of its contempt powers or through the use of any of its powers? This Court has no divisions. Logically, the Fifth Circuit is making the mistake of confusing "deterrence" with "protection". Use of harsh contempt citation[3] because of a Rule 6(e) violation might deter future violations, but it does not offer "protection". If it offered "protection" then there would be no need for the contempt in the first instance. Likewise, the prohibition against importing marijuana, 21 U.S.C. § 952, offers "deterrence" instead of "protection". Otherwise, there would have been no crash of marijuana-laden plane in 1976 near Marfa, Texas. If § 952 guaranteed that the forbidden acts would not occur rather than merely punishing violators after the forbidden acts occurred, we could say it truly offered protection instead of mere deterrence. The constitutional right against self-incrimination is deserving of

---

[2] *United States v. Braniff Airways, Inc.,* 428 F. Supp. 579, 583-584 (W.D. Tex. 1977); *United States v. Brazzano,* 570 F.2d 1120 (3d Cir. 1977); *United States v. Phillips Petroleum,* 435 F. Supp. 610 (D. Okla. 1977).

[3] However, counsel is unaware of any harsh contempt citations lodged against U.S. Attorneys in the Western District of Texas or elsewhere for that matter, regardless of the basis.

"full protection", *Murphy v. Waterfront Commission of New York,* 378 U.S. 53 (1964), not merely deterrence, *Lemieux,* at 1168.

III.

WHETHER THE PETITIONER BRUMMITT WAS ENTITLED TO PRESENT HIS CLAIM OF FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION TO THE JURY IN HIS CRIMINAL CASE.

The Fifth Circuit relied on the case of *United States v. Bukowski,* 435 F.2d 1094 (7th Cir. 1970), *cert. denied,* 401 U.S. 911, 91 S. Ct. 874, 37 L. Ed. 2d 809 (1971), to hold that the Appellant's self-incrimination claim was purely a legal matter for the Court. However, the holding in *Bukowski* was predicated on the fact that that Defendant was challenging the validity of the Judge's order to testify and the *Bukowski* Court held that invalidity was no defense and that if it were it would be a legal question. Here, the Petitioner does not challenge the validity of the order directly, but instead contends that he has a Fifth Amendment defense to any criminal prosecution. The contention of this Petitioner is that his Fifth Amendment claim was a mixed question of law and fact with the heavier weight on the facts. The trial court is generally required to allow a defendant to present evidence of his defenses and to instruct the jury accordingly, *United States v. Elorduy,* 612 F.2d 986 (5th Cir. 1980); *United States v. Reyes,* 645 F.2d 285 (5th Cir. 1981). Likewise, the law has often required the submission of Fifth Amendment issues (see 18 U.S.C. § 3501(a)). This Petitioner argues that he should have been allowed to present evidence of this highly factual defense because:

> No fact, not even an undisputed fact, may be determined by the Judge. If the plea of not guilty puts all in the issue, even the most patent truths.

United States v. Sheldon, 544 F.2d 213 (5th Cir. 1976) at 221.

IV.

THE PETITIONER SCARBOROUGH'S CONVICTION FOR CRIMINAL CONTEMPT FOR REFUSING TO TESTIFY BEFORE A GRAND JURY WAS VOID OR VOIDABLE BECAUSE THE APPELLANT'S REFUSAL TO TESTIFY WAS A LEGITIMATE EXERCISE OF HIS FIFTH AMENDMENT RIGHTS TO REMAIN SILENT.

A. The Law

1. *A Fear of Foreign Prosecution*

It appears that the law in this United States encompasses a Fifth Amendment claim based solely upon a fear of prosecution. The Supreme Court of the United States has previously noted probable jurisdiction in such a case, *Zicarelli v. New Jersey Investigation Commission,* 406 U.S. 472, 478 (1973). In that cause, that Court did not "reach the constitutional question", which was the applicability of Fifth Amendment to foreign prosecution, *Zicarelli,* 406 U.S. at 478, because that Court found that the specific questions asked of witness *Zicarelli* did not require answers which would have incriminated him under foreign law, *Zicarelli,* 406 U.S. at 479-481. However, the Court states:

> Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, and should such inquiry be sustained over a relevancy object, then a constitutional question will be squarely presented.

(Footnote omitted.) *Zicarelli*, 406 U.S. at 481.

Since *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964), the United States Supreme Court has accepted the premise that a witness could not be compelled in one jurisdiction "to give testimony which could be used to convict him of a crime in another jurisdiction". *Murphy*, 378 U.S. at 77. Although the *Murphy* Court did not specifically decide the issue of the applicability of the Fifth Amendment to foreign prosecution, that Court utilized the English Rule set forth in *United States of America v. McCrae*, LR 3 Ch App. 79 (1867), to support the precise holding in *Murphy* that the Fifth Amendment protects a state witness against incrimination from both State and Federal laws. The *Murphy* Court characterized *McCrae* as holding that where there was a valid fear of foreign prosecution, the issue could not be distinguished, "in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our municipal law". *McCrae*, 3 Ch App. at 87. And, of course, *Zicarelli* in no measure impairs that principles of precedents of the *Murphy* decision, but simply holds that the questions and the context must "squarely present the issue" before consideration by any Court.

In our cause, the unanswered questions resulting in contempt dealt specifically with crimes "in Mexico" and the contextual facts revolved around a crash of a contraband-laden aircraft, only a few miles over the Mexican-United States Border. Thus, contrary to the situation in *Zicarelli*, the constitutional question is "squarely presented" herein and today this constitutional question is even more relevant than when first asked. The world has grown smaller, not larger. The prospect

of foreign prosecution, foreign confinement, and the like has metamorphosized from an idea held mainly in the abstract to a commonplace fact printed and broadcast in the daily media. The changing context of the modern world call for a reexamination and resolution of this question.

2. *The Appellant's Guilty Plea*

The Petitioner pled guilty on October 16, 1980 (RL 132). The Petitioner argues that this conviction is void because his conduct was not punishable in first instance. The Appellant contends that the right to remain silent as protected and embodied in the Fifth Amendment to the United States Constitution both legitimized his silence and rendered any attempt to punish such conduct violative of the United States Constitution. In other words, the actions of the Appellant were not criminal although in violation of the Court order. The Appellant's conviction for contempt for his refusal in any lawful exercise of his Fifth Amendment rights is constitutionally invalid because the Supreme Court has held the Fifth Amendment guarantee against self-incrimination is an absolute and complete defense against such prosecutions. *Leary v. United States,* 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969). And there is solid precedent for considering such a conviction as "void". This is because the conduct involved may not "be punished in the first instance", *United States v. United States Coin & Currency,* 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041:

> Rather *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance . . . [T]he conduct being penalized is constitutionally immune from punishment.

To analogize these decisions' facts to our case, we must see that it was as much a violation of law to fail to pay the marijuana tax (*Leary*), as for the Petitioner to remain silent against a Court order. However, neither conduct is punishable.

This self-incrimination defense has been held to be applicable even in situations involving guilty plea bargaining. *United States v. Liquori,* 430 F.2d 842 (1970); *Harrington v. United States,* 444 F.2d 1190 (5th Cir. 1971), such as in our case (RI 132). Thus, the Petitioner is clearly entitled to raise this issue on appeal even after his plea-bargained plea of guilty below.

V.

WHETHER THE INDICTMENT AGAINST PETIONER BRUMMIT SHOULD HAVE BEEN DISMISSED BECAUSE IT WAS RETURNED BY THE VERY GRAND JURY THAT WITNESSED HIS ALLEGED CONTEMPT AND WHOSE INVESTIGATION WAS IMPEDED BY HIS ALLEGED CONTEMPT.

The Petitioner argued that he could not be properly indicted by the same Grand Jury which witnessed his contempt and whose investigation was impeded by his alleged contempt because there would be no way that such a Grand Jury could perform its traditional function, quoting:

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . . . *Wood v. Georgia,* 370 U.S. 375, 390, 8 L.Ed.2d 569, 580, 82 S.Ct. 1364 (1962) (footnote omitted).

Indeed, the primary witness against the Petitioner in his trial below was the Grand Jury foreman (RIV 40-57). While it may be presumed that judges lay aside their prior knowledge of a case, no such presumption exists for layman jurors, *Rideau v. Louisiana,* 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963). And, of course, there is no opportunity to voir dire grand jurors. Thus, the Petitioners' right of indictment from a fair and unbiased grand jury was not honored.

The Fifth Circuit neglected to mention or rule on this issue in spite of the fact that the issue was raised below (RI 60, et seq.), and was clearly submitted to that Court, Appellant Brummitt's *Brief in Chief* at 1A, 8, 42-44; *Reply Brief* at 15-16. The Petitioner respectfully requests a ruling from this Court on this issue because it is a question of first impression.

CONCLUSION AND PRAYER

WHEREFORE, the above premises considered, the Petitioners pray that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and thereafter reverse their convictions.

Respectfully submitted,

RICHARD ESPER
1100 Montana, Suite 201
El Paso, Texas 79902
(915) 533-3494

Attorney of Record
for Petitioners

Appendix

APPENDIX A

[Publish]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1067

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BRUMMITT,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(December 28, 1981)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges. TATE, Circuit Judge:

David Brummitt appeals from his conviction for criminal contempt for failure to testify before a federal grand jury after being granted use immunity under 18 U.S.C. §§ 6002, 6003. On appeal, Brummitt principally claims that (a) the testimony he refused to give would subject him to foreign prosecution, against which use immunity would not protect him, and that he was denied an opportunity to present evidence as to the real hazard of foreign prosecution that his testimony would present;

(b) his five year sentence is excessive; and (c) the jury selection process in the district does not represent a cross-section of the community. For the reasons set forth below, we affirm Brummitt's conviction.

Brummitt's instant conviction arises out of his refusal to testify on September 18, 1979 and again on August 8, 1980, before a federal grand jury investigating the 1976 crash of a marijuana-loaded airplane in Marfa, Texas, just a few miles north of the Mexican border, in a flight originating in Mexico. Brummitt, under court subpoena, appeared before the grand jury on September 18, 1979, but refused to testify concerning the events of the marijuana purchase in Mexico and its American based financing, invoking his fifth amendment right against self-incrimination. Brummitt continued in his refusal to testify even after being given a grant of use immunity. He was held in civil contempt and served four months in civil confinement. The facts surrounding that adjudication are set out in prior proceedings that affirmed his civil contempt conviction. In Re Grand Jury Proceedings (Brummitt and Scarborough), 608 F.2d 640 (5th Cir. 1979), after remand, 613 F.2d 62 (5th Cir. 1980).

On August 8, 1980, after serving his civil contempt sentence, Brummitt was again summoned before the same federal grand jury, and again refused to answer the same questions concerning the events leading to the 1976 crash of the marijuana-loaded plane. At this time he was charged with criminal contempt under 18 U.S.C. § 401(3)[1] for his failure to testify on the two occasions.

---

[1] Brummitt was charged in count one with refusal to testify on September 18, 1979 and in count two with refusal to testify on August 8, 1980. The government at no time suggested that

[footnote continued]

After a jury trial on the merits, Brummitt was convicted and sentenced to five years imprisonment on count one, with credit for time served in civil confinement.

A. Fifth Amendment Challenge

Brummitt invoked his fifth amendment privilege and refused to answer, on two occasions, questions propounded to him before the federal grand jury concerning the purchase of illegal drugs, and its financing, that preceded the 1976 plane crash. He continued in his refusal even after receiving a grant of use immunity. Brummitt claims on appeal that such testimony would subject him to possible prosecution in a foreign country (Mexico). The district court, having allowed the defendant to make an offer of proof[2] to the effect that Brummitt had an actual subjective fear of foreign prosecution, ruled that Brummitt's claims of a fear of Mexican prosecution were only conclusory and speculative. The proffer submitted by statement of counsel pointed out that Mexican criminal law, which permits in absentia

---

multiple criminal punishment should be imposed for the two consecutive refusals to answer questions about the same transaction.

18 U.S.C. § 401(3) provides:

Section 401. POWER OF COURT

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[2] The district court had offered to take testimony and set a time for a hearing, but (according to the district court's opinion) the defense counsel later indicated he would file a proffer. (R. Ex. 112).

prosecutions, imposes harsh criminal penalties and that Mexican courts would not be bound by a grant of immunity in the United States. It also suggested that the United States Attorney could under Fed. R. Cr. P. 6(e)(3) lawfully leak information of the defendant's grand jury testimony to a federal enforcement agency (the Drug Enforcement Administration), which federal agency shares information with the Mexican drug enforcement agencies.

Aside from finding highly speculative the defendant's subjective fears of Mexican prosecution for the marijuana transaction of some five years ago, the district court primarily relied upon the court's power, in compelling testimony under a grant of immunity, to prohibit its disclosure for any other purpose than for American criminal prosecution.

Under Fed. R. Cr. P. 6(e)(3) (as last amended in 1979),[3] a federal attorney with criminal prosecutorial

---

[3] As amended in 1979, Fed. R. Cr. P. 6(e)(3) relevantly provides:

> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury; may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal

[footnote continued]

powers may ex parte obtain disclosure of grand jury testimony "for use in the performance of *such attorney's* duty," as may other "government personnel" as are deemed necessary by such attorney to assist him in the performance of "such attorney's duty to enforce the *federal* criminal law." The district court held that the rule permitting disclosure without court order to government attorneys (and those acting for them in aid of their federal criminal duties) did *not* authorize them to disclose the testimony they had obtained to any other prosecutorial authority without court authorization. In its oral comments explaining its rule, the court stated that those matters that are obtained before the grand jury on a grant of immunity could not be released except with the consent of the court, and that the court could not "put itself in the position of violating the grand jury's integrity by allowing that proof to be released once the person has been given immunity. The court would be under an obligation to seal what he said before the grand jury." R.IV, pp. 12-13.[4]

---

criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

* * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

As pointed out in the 1977 Advisory Committee report, "attorney for the government" is defined for purposes of the Federal Rules of Criminal Procedure, as the Attorney General, a United States Attorney, and their authorized assistants.

[4] In its written order ruling on the motion, the court summarized this view thusly:

[footnote continued]

In the defendant's previous civil contempt case, reiterating the point that in this circuit *fear* of foreign prosecution is not a defense to contempt for refusal to testify, we stated:

> In our prior opinion, we relied on precedent to hold that the fear of foreign prosecution is not a defense to contempt for refusal to testify and "that a grand jury witness is adequately protected against the leak of his testimony by the district court's power to prevent such disclosure. *See* Fed. R. Crim. P. 6(e)." 608 F.2d at 643. *See In Re Grand Jury Proceedings (Postal),* 559 F.2d 234 (5th Cir. 1977) (per curiam), *cert. denied,* 434 U.S. 1062, 98 S. Ct. 1234, 55 L. Ed. 2d 762 (1978); *In Re Tierney,* 465 F.2d 806 (5th Cir. 1972), *cert. denied,* 410 U.S. 914, 93 S. Ct. 959, 35 L. Ed. 2d 276 (1973). Even if we were to entertain such a defense in this circuit, *cf. In Re Federal Grand Jury Witness* (Lemieux), 597 F.2d 1166, 1168-69 (9th Cir. 1979) (Hufstedler, concurring specially), appellants' offer of proof has not presented a sufficient showing that they will be prosecuted by a foreign sovereign or that the protections of Rule 6(e) will be inadequate to prevent the disclosure of incriminating testimony. The trial court, therefore, committed no error in refusing to entertain appellant's defense.

In Re Brummitt, 613 F.2d 62, 64 (5th Cir.), *cert. denied,* 447 U.S. 907, 100 S. Ct. 2990 (1980).

The defendant relies on Zicarelli v. New Jersey State Commissioner of Investigation, 406 U.S. 472, 92 S. Ct.

To infer that this Court would on the one hand give defendant immunity, and on the other hand renig on its own integrity is so difficult to assume it is speculative. Only the Court can give immunity; only the Court can order the witness to answer; only the Court can order disclosure.

1670 (1972), for the proposition that the fifth amendment privilege should include a fear of foreign prosecution. There the Court found there was no showing that the defendant was ever in real danger of being compelled to disclose information that might incriminate him under foreign law. *Id.* 406 U.S. at 479-81, 92 S. Ct. at 1675-76. The Fifth Circuit in In Re: Tierney, 465 F.2d 806, 811-12 (5th Cir. 1972), *cert. denied,* 410 U.S. 914, 93 S. Ct. 959 (1973), reached the identical result that was reached in *Zicarelli,* but for different reasons. The view of the Fifth Circuit was that due to the secrecy of the grand jury proceedings, no substantial risk of foreign prosecution was posed, citing Rule 6(e). The court decided that it would not rule on a speculative hypothesis that did not make out a substantial risk of foreign prosecution resulting from the compelled testimony.

While the Fifth Circuit has recognized that a different case might be presented where the appellant demonstrated that the content of his answers would be used as evidence against him in a foreign prosecution, In Re: Grand Jury Proceedings (Field), 532 F.2d 404, 406 (5th Cir.), *cert. denied,* 429 U.S. 940, 97 S. Ct. 354 (1976), the defendant Brummitt has not made a showing on the record that he is in any real danger that his compelled testimony might be used in or give rise to a foreign prosecution. In Re Grand Jury Proceedings (Postal), 559 F.2d 234, 236-37 (5th Cir. 1977), *cert. denied,* 434 U.S. 1062, 98 S. Ct. 1234 (1978). Furthermore, under present circuit jurisprudence, "because of the secrecy of the grand jury proceedings no substantial risk of foreign prosecution is posed. Rule 6(e), Fed. R. P., provides for this secrecy." *In Re Tierney, supra,* 465 F.2d at 811. *Cf.,* United States v. Malatesta, 583 F.2d 748, 752-53 (5th Cir. 1978), *reh.,* 590 F.2d 1379 (on

other grounds), *cert. denied,* 444 U.S. 846, 100 S. Ct. 91 (1979).

The defendant Brummitt contends, however, that the protection envisaged by these prior Fifth Circuit decisions—that the court that granted immunity could seal its use as for the purposes of foreign prosecution—has been eroded by broadening amendments to Rule 6(e)(3) that permit government personnel, in addition to federal attorneys, to secure access to the grand jury testimony. However, as earlier noted (see text at footnote 3), disclosure to such personnel is limited to purposes of assisting the attorney to enforce federal (American) criminal law, and neither the attorney nor his assisting personnel may disclose this testimony to other law enforcement personnel without express court order. See United States v. Malatesta, *supra* 583 F.2d at 752-53. Insofar as the defendant relies upon the thoughtful concurring opinion of Judge Hufstedler in In re Federal Grand Jury Witness (Lemieus), 597 F.2d 1166, 1168 (9th Cir. 1979), we may simply say that the views there expressed are foreclosed to us by controlling precedent of this circuit.

Without citation of relevant authority, Brummitt also contends that he should have been permitted to make a factual showing of the reality of the threat to him of foreign prosecution that might result from his compelled testimony. As we understand the record, the district court afforded him an opportunity to do so before the court itself in a nonjury hearing, but Brummitt was content to rely upon his proffer—and, in the light of controlling circuit precedent, we find that this proffer was not sufficient to show more than a speculative and merely abstract fear of foreign prosecution. Brummitt contends that he should have been permitted to present

before the jury the reality of his fear of foreign prosecution, as a defense to the charged criminal contempt. However, the contempt was based on his failure to comply with a court order directing him to answer the questions, and the lawfulness of the court's order "involves a pure question of law whose determination is cognizable by the court and not the jury." United States v. Bukowski, 453 F.2d 1094, 1108 (7th Cir. 1970), *cert. denied,* 401 U.S. 911, 91 S. Ct. 874 (1971).

B. Excessive Sentence on Criminal Contempt Charge

Brummitt also contends on appeal that his criminal sentence of five years is excessive. A sentence for criminal contempt (under 18 U.S.C. § 401) is properly reviewable on appeal, United States v. Leyva, 513 F.2d 774, 779 (5th Cir. 1975), where the trial court has abused its discretion, Green v. United States, 356 U.S. 165, 188, 78 S. Ct. 632, 645 (1958).

Brummitt's argument that his five year sentence should be reduced as excessive is grounded on prior circuit cases which required the reduction of a thirty-five year sentence, United States v. Leyva, *supra,* 513 F.2d 774, and a fifteen year sentence for criminal contempt, United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1975), to a two-year sentence.

In the instant case the defendant was sentenced to one five year term, with credit for the four months served for civil contempt. This sentence is much less severe initially than the sentences first imposed on the defendants in *Leyva* and *Gomez.* Considering the fact that the defendant would have been subject to five years imprisonment under 18 U.S.C. § 1510 for obstruction

of a criminal investigation into narcotics violations (the effect of Brummitt's refusal to answer questions was to prevent the investigation and timely prosecution of the criminal financing in Texas of the marijuana importation) or subject to a five year sentence for perjury under 18 U.S.C. § 1621 (if he *had* testified, but falsely),[5] and in view of Brummitt's refusal to answer any questions concerning the marijuana transaction itself or his financial backing in the United States, we cannot say that this sentence is an abuse of the trial court's discretion. Accordingly, we affirm the criminal contempt sentence of five years (less credit for time served on the *civil* contempt.

C. Jury Selection Process

Additionally, Brumitt argues that the grand jury selection process in the El Paso Division of the Western District of Texas violates the requirements of both constitutional due process and of a statute (28 U.S.C. § 1861 et seq.) designed to assure random selection from a fair cross-section of the community. In his motion to dismiss the indictment,[6] Brummitt alleges that there is

---

[5] In *Leyva, supra,* 513 F.2d at 780, a thirty-five year conviction for criminal contempt was reduced to two years, a formula arrived at by consulting the penalty for civil contempt (18 months), the penalty for perjury (5 years), and the penalty for the overt obstruction of a criminal investigation into narcotics violations (5 years).

[6] 28 U.S.C. § 1867(a):

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

a significant underrepresentation of Hispanic surnamed individuals on the Master Jury List, due to their low representation in the voter registration list, which was the exclusive source of the jury list.

Brummitt introduced evidence, by affidavit and at the September 19, 1980 hearing on his motion to dismiss, that of the general population of El Paso County,[7] based on the 1970 census, 58.1% have Spanish or Hispanic surnames; that the district clerk obtains the Master Jury List (the names of prospective grand and petit jurors) exclusively from the voter registration lists (R. 2, 15); and that on the Master Jury List only 38.5% of those listed have Spanish or Hispanic surnames. Brummitt argues that this 19.6% disparity between the percentage of Hispanics in the total population and the percentage of Hispanics in the Master Jury List results from the fact that prospective jurors are chosen solely from the voter registration lists and that Mexican-Americans traditionally register to vote in fewer numbers than do other recognizable groups.

(a) *Constitutional Due Process Claim*

The requirements necessary to establish a constitutional claim of discrimination in the selection of a grand jury were set out in Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272 (1977). A defendant must show (1) that the group against whom discrimination is alleged "is one that is a recognizable, distinct class," (2) that the group is underrepresented on jury panels over a significant period of time, and (3) that the selection procedure is

---

[7] El Paso County is co-extensive with the El Paso Division of the Western District of Texas.

not racially neutral, or is susceptible of being used as a tool of discrimination. *Id.* 430 U.S. at 494, 97 S. Ct. at 1280. These prerequisites must be met before the defendant establishes a prima facie case, shifting the burden to the state to rebut the showing. Additionally, *Castaneda* requires the showing of some form of *intentional* discrimination. *Id.* 430 U.S. at 493, 97 S. Ct. at 1279. Neither a prima facie case nor the requisite intentional discrimination has been here established. As we recently stated, rejecting similar constitutional contentions:

> A prima facie case of discrimination cannot rest merely on statistics. The fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional issue. United States v. Arlt, 567 F.2d 1295, 1297 (5th Cir. 1978).

United States v. Lopez, 588 F.2d 450, 452 (5th Cir.), *cert. denied,* 442 U.S. 947, 99 S. Ct. 2895 (1979).[8]

(b) *Statutory Discrimination Claim*

In addition to the claim of a denial of constitutional equal protection in the selection of grand jury panels, the defendant Brummitt also claims a discriminatory violation of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-74, timely raised by motion to dismiss the indictment, § 1867(a) (quoted in footnote 6). The statute declares its purpose is to recognize the right of litigants entitled to trial by jury "to grand and

---

[8] *Lopez* involved a constitutional challenge to jury selection procedures in the Northern District of Texas that produced an underrepresentation of Mexican-Americans.

petit juries selected at random from a fair cross-section of the community," § 1861, and it prohibits exclusion of citizens from jury service "on account of race, color, religion, sex, national origin, or economic status."[9]

The Act authorizes the adoption of a jury plan based on the selection of potential jurors exclusively from the voter registration lists, 28 U.S.C. § 1863(b)(2). However, the statute itself provides that the plan shall

> specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. *The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.*

28 U.S.C. § 1863(b)(2) (emphasis supplied).

The question presented is whether the plan used in the Western District of Texas fails to comply with the Act because it does not prescribe some other source of names

---

[9] These statutory provisions in full provide:

> § 1861. Declaration of policy
>
> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.
>
> § 1862. Discrimination prohibited
>
> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

in addition to the voter list,[10] alleged "necessary" to assure a fair cross-section since Hispanic Americans are significantly underrepresented on the voting registration lists.

The ground for attacking a plan is "a substantial failure to comply" with the provisions of the statute. 28 U.S.C. § 1867(d). Determining substantial compliance requires weighing the alleged violation against the goals of the Act. United States v. Davis, 546 F.2d 583, 589 (5th Cir.), *cert. denied,* 431 U.S. 906, 97 S. Ct. 1701 (1977). Relying on *Davis,* the court in United States v. Maskeny, 609 F.2d 183 (5th Cir.), *cert. denied,* 447 U.S. 921, 100 S. Ct. 3010 (1980) recognized that

> [t]he Court [in *Davis*] identified the major goal of the statute as the random selection of juries from a fair cross-section of the community; toward that end voter lists are to be the primary source of jurors' names and disqualifications, excuses, exemptions, and exclusions are to be based solely on objective criteria, *id.* The Court then held that one aspect of the selection process there under review constituted a technical violation of that statute but that the violation in no way affected the random nature of objectivity of the selection process and therefore did not constitute a substantial failure to comply with the statute.

609 F.2d at 191.

---

[10] The district court noted that the defendant did not suggest supplemental lists. Possible suggestions might be lists of utility subscribers, motor vehicle registration lists, drivers license lists, etc. Congress, however, has left the determination, when necessary, to the judiciary. H.R. Rep. No. 1076, 90th Cong., 2d Sess., *reprinted in* (1968) U.S. Code Cong. & Ad. News 1792, 1794. *See also,* Kairys, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Calif. L. Rev. 776 (1977).

The deputy clerk for El Paso testified that the jury list was selected randomly, by computer, from one list of registered voters. Brummitt makes no contention here that this is not so. His sole complaint appears to be that the jury list shows a 19.6% underrepresentation of Hispanics because it is drawn exclusively from the list of registered voters, which in turn allegedly is not representative of the general Hispanic American population.

On the record before us, Brummitt attempted to establish that a greater proportion of Hispanic surnamed individuals do not register to vote than other segments of the population. The record is totally devoid of any other evidence, or any statistical data presented by the defendant to establish his claim that this voter registration list itself represented a significant enough underrepresentation of Hispanics to cause the jury list to be illegally constituted.[11]

This court has held that failure of an identifiable group to register and vote does not render invalid the selection of jurors from a voter registration list.[12] We have also recognized that

> [o]nce a plaintiff establishes a prima facie case of jury discrimination which goes unrebutted, corrective action may be required. In considering the

---

[11] In U.S. v. Goff, 509 F.2d 825 (5th Cir.), *cert. denied*, 423 U.S. 857, 96 S. Ct. 109 (1975, for example, the percentages of blacks and food stamp recipients in the *entire population* was compared to the percentages of each category *registered to vote.*

[12] United States v. Lopez, *supra*, 588 F.2d at 452; United States v. Arlt, 567 F.2d 1295, 1297 (5th Cir. 1978), *cert. denied*, 436 U.S. 911, 98 S. Ct. 2250 (1978); United States v. James, 528 F.2d 999, 1022 (5th Cir. 1976); Camp v. United States, 413 F.2d 419, 421 (5th Cir.), *cert. denied*, 396 U.S. 968, 90 S. Ct. 451 (1969).

> degree of corrective action required, "the court may exact from officials responsible for the construction of the jury list a high standard of comparability between demographic percentages and those of the jury list." Berry v. Cooper, 577 F.2d 322, 327 (5th Cir. 1978) (quoting Broadway v. Culpepper, 439 F.2d 1253, 1259 (5th Cir. 1971)). In exacting this high standard of comparability, a disparity which would be insufficient to prove substantial underrepresentation in the first instance may be sufficient to require additional corrective action *after an unrebutted prima facie case of jury discrimination has been established.*

Newberry v. Willis, 642 F.2d 890, 893 (5th Cir.), *reh. denied,* 650 F.2d 284 (1981) (emphasis added). However, here, no prima facie case of jury discrimination has been established.

The thrust of the defendant's evidence establishes only that there is a disparity between the proportion of Hispanic Americans in the *gross* general population and the proportion of those selected on the master jury list (although the latter is roughly equal to the proportion of Hispanic Americans on the voting registration lists, from which potential juries are fairly and randomly selected). However, to establish the prima facie case of a denial of a fair cross-section, the disparity between the proportion of members of an identifiable class on a jury list must be based not on *total* population but, instead, on those of the identifiable class who are *eligible* to serve as jurors. Section 1861 only requires that a fair cross-section of the community include that they be fairly drawn from those eligible to serve on the jury. United States v. Gordon-Nikkor, 518 F.2d 972, 976 (5th Cir. 1975); United States v. McVean, 436 F.2d 1120, 1122 (5th Cir. 1971), *cert. denied,* 404 U.S.

833, 92 S. Ct. 45 (1971), *reh. denied,* 404 U.S. 952, 92 S. Ct. 277 (1971).

The evidence as to underrepresentation of Hispanic Americans on the voting registration lits rests on generalized and unspecific testimony that traditionally they tend to register in lesser numbers. The evidence does not attempt to demonstrate that the proportion of Hispanic Americans in the general population is similar to that of those eligible to serve as jurors.

The Act itself provides eligibility requirements for jury service. 28 U.S.C. § 1865.[13] With regard to those requirements, the evidence before us does not, for instance, show the proportion of residents with Hispanic surnames who are citizens or who are able to speak and satisfactorily read and write English, to mention certain obvious juror-eligibility requirements that the numbers of Hispanic-surnamed individuals in an area adjacent to

---

[13] 28 U.S.C. § 1865(b) provides:

> (b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—
>
> (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
>
> (3) is unable to speak the English language;
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

the Mexican border might not be expected to possess in similar proportion to other identifiable segments of the total population.[14]

On the record before us, Brummitt has failed to carry his burden of establishing a prima facie case of substantial non-compliance with the statutory provisions.

We, therefore, affirm the denial of Brummitt's motion to dismiss the indictment,[15] although we acknowledge that when such evidence is provided and a prima facie case of jury discrimination is established, supplementation of the voter list with "some other source or sources of names in addition to voter lists" is congressionally mandated. 28 U.S.C. § 1863(b)(2). While, as the district court states, no cases have been found in which a jury plan was found to violate the statute for failure to supplement a primary voter list,[16] the statutory requirement is clear that when it is established that the

---

[14] We have previously noted, in discussing the magnitude of disparity needed to establish a prima facie case, that an important issue is presented as to whether general population statistics or more meaningful eligible population statistics should be used. Here, no facts were presented which would allow this court to consider any possible disparity or "implicit assumptions" presented by such statistics. "The inquiry is an important one – a given disparity may increase or decrease substantially depending on which set of statistics is employed." U.S. ex rel. Barksdale v. Blackburn, 639 F.2d 1115, 1123 (5th Cir. 1981). *See also*, Gewin, An Analysis of Jury Selection Decisions, Appendix to Foster v. Sparks, 506 F.2d 805, 811 (5th Cir. 1975).

[15] We thus affirm the district court decision. United States v. Brummitt, 503 F. Supp. 859 (W.D. Tex. 1980).

[16] *See* United States v. Gaona, 445 F. Supp. 1237, 1240 (W.D. Tex. 1978), which cites cases listed in Gewin, *supra* n.12 for this proposition. *Butt see*, Berry v. Cooper, 577 F.2d 322 (5th Cir. 1978) (jury lists found to be discriminatory may be required to be revised).

"policies" and "rights" secured by 28 U.S.C. §§ 1861, 1862 are not met by exclusive use of voter lists, it is incumbent on the officials responsible for constructing the jury list to provide additional sources.[17] *Cf.* Newberry v. Willis, *supra*, 642 F.2d at 893.

Conclusion

For the reasons stated above we AFFIRM Brummitt's conviction and five year sentence for criminal contempt.

AFFIRMED.

---

[17] *See* note 10, *supra*.

APPENDIX B

[Do Not Publish]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1066

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK WAYNE SCARBOROUGH,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(November 23, 1981)

Before THORNBERRY, and WILLIAMS, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1067

[Filed: Feb. 8, 1982]

[Received: Feb. 11, 1982]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID BRUMMITT,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(February 8, 1982)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1066

[Filed: Feb. 8, 1982]

[Received: Feb. 11, 1982]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK WAYNE SCARBOROUGH,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(February 8, 1982)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.